U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

FILE: [redacted] Office: California Service Center Date: DEC 21 2001

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of the Foreign Residence Requirement under Section 212(e) of the Immigration and Nationality Act, 8 U.S.C. 1182(e)

IN BEHALF OF APPLICANT: Self-represented

Public Copy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

[redacted]

DISCUSSION: The application was denied by the Director, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Ghana who is subject to the two-year foreign residence requirement of section 212(e) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1182(e), because he participated in an exchange program which was financed by a government agency. The applicant was admitted to the United States as a nonimmigrant exchange visitor in August 1980. The applicant married a United States citizen on July 8, 1992, and he is the beneficiary of an approved petition for alien relative. The applicant is now seeking the above waiver after alleging that his departure from the United States would impose exceptional hardship on his U.S. citizen spouse.

In November 1993, the applicant filed an application for waiver of the two-year foreign residence requirement and the Service requested a favorable recommendation from the United States Information Agency (USIA) stating that the applicant presented reasons claiming financial and emotional hardship due to separation and the fact that his wife would not receive the proper medical care if she became pregnant. The USIA denied the Service's request for a favorable recommendation on April 7, 1995. The Service then denied that application on May 8, 1995.

On August 13, 1997, the applicant filed a second application for waiver of the foreign residence requirement. On September 9, 1997, the Service improvidently sent out a notice of approval without having received a favorable recommendation by the USIA. On September 15, 1997, the Service reopened the matter on a Service motion to reopen and vacated that decision. On February 26, 2001, the director determined that the record failed to establish that the applicant's departure from the United States would impose exceptional hardship upon his United States citizen spouse and denied the application accordingly.

On appeal, the applicant discusses his nine years of marriage, his 19 month-old son, his wife's medical condition, his son's medical condition, and the improvident approval of the application in 1997 without a favorable recommendation of the USIA.

It is noted that the record fails to contain any evidence that the applicant is the father of a child, and the record contains only medical evidence relating to the applicant's wife dated 1997 or earlier.

Section 212(e) of the Act provides that:

No person admitted under section 101(a)(15)(J) of the Act or acquiring such status after admission-

> (i) whose participation in a program for which he came to the United States was financed in whole or in part,

directly or indirectly, by an agency of the Government of the United States or by the government of the country of his nationality or his residence,

(ii) who at the time of admission or acquisition of status under section 101(a)(15)(J) was a national or resident of a country which the Director of the United States Information Agency, pursuant to regulations prescribed by him, had designated as clearly requiring the services of persons engaged in the field of specialized knowledge or skill in which the alien was engaged,...

shall be eligible to apply for an immigrant visa or for permanent residence, or for a nonimmigrant visa under sections 101(a)(15)(H) or 101(a)(15)(L) until it is established that such person has resided and been physically present in the country of his nationality or last residence for an aggregate of at least two years following departure from the United States: Provided, That upon the favorable recommendation of the Director, pursuant to the request of...the Commissioner of Immigration and Naturalization after he has determined that departure from the United States would impose exceptional hardship upon the alien's spouse or child (if such spouse or child is a citizen of the United States or a lawfully resident alien),...the Attorney General may waive the requirement of such two-year foreign residence abroad in the case of any alien whose admission to the United States is found by the Attorney General to be in the public interest...the Attorney General may, upon the favorable recommendation of the Director, waive such two-year foreign residence requirement in any case in which the foreign country of the alien's nationality or last residence has furnished the Director a statement in writing that it has no objection to such waiver in the case of such alien.

Matter of Mansour, 11 I&N Dec. 306 (D.D. 1965), held that even though it is established that the requisite hardship would occur abroad, it must also be shown that the spouse would suffer as the result of having to remain in the United States. Temporary separation, even though abnormal, is a problem many families face in life and does not represent exceptional hardship as contemplated by section 212(e) of the Act. See Matter of Bridges, 11 I&N Dec. 506 (D.D. 1965).

Adjudication of a given application for a waiver of the foreign residence requirement is divided into two segments. Consideration must be given to the effects of the requirement if the qualifying spouse and/or child were to accompany the applicant abroad for the stipulated two-year term. Consideration must separately be given to the effects of the requirement should the party or parties choose to remain in the United States while the applicant is abroad.

An applicant must establish that exceptional hardship would be imposed on a citizen or lawful permanent resident spouse or child by the foreign residence requirement in both circumstances and not merely in one or the other. Hardship to the applicant is not a consideration in this matter.

In a discussion of the term "exceptional hardship," consideration must be given to the report in H.R. Rep. No. 721, 87th Cong., 1st Sess. 121 (1961), entitled *Immigration Aspects of the International Educational Exchange Program*. Subcommittee number one of the Committee on the Judiciary reiterated and stressed the fundamental significance of a most diligent and stringent enforcement of the foreign residence requirement and stated it is believed that it is detrimental to the purposes of the program and to the national interests of the countries concerned to apply a lenient policy in the adjudication of waivers including cases where marriage occurring in the United States, or the birth of a child or children, is used to support the contention that the exchange alien's departure from this country would cause personal hardship. The court noted additionally that the significance traditionally accorded the family in American life warrants that where the applicant alleges that denial of a waiver will result in separation from both a citizen-spouse and a citizen-child, a finding of "no exceptional hardship" should not be affirmed unless the reasons for this finding are made clear. The court's insistence upon clear articulation of reasons in cases involving a citizen-spouse and a citizen-child is consistent also with Congressional policy.

The record is devoid of specific current documentation which would reflect that the applicant's wife would be unable to maintain herself in the United States for two years while the applicant returns temporarily to Ghana. Further, the hardship of separation anticipated here, if the applicant's spouse chose to remain in the United States, is the usual hardship which might be anticipated during a temporary separation between family members caused by military, business, educational, or other obligations. While certainly inconvenient, such hardship does not rise to the level of "exceptional" as contemplated by Congress.

In this proceeding, it is the applicant alone who bears the full burden of proving his or her eligibility. Matter of T--S--Y--, 7 I&N Dec. 582 (BIA 1957); Matter of Y--, 7 I&N Dec. 697 (BIA 1958). In this case, the burden of proof has not been met, and the appeal will be dismissed.

ORDER: The appeal is dismissed.